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REHEARING 3-27-01

**BEFORE THE ARIZONA CORPORATION COMMISSION**

WILLIAM A. MUNDELL  
CHAIRMAN  
JIM IRVIN  
COMMISSIONER  
MARC SPITZER  
COMMISSIONER

Arizona Corporation Commission

**DOCKETED**

FEB 27 2001

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*SG*

Docket No. RE-00000C-00-0377

IN THE MATTER OF THE NOTICE OF  
PROPOSED RULEMAKING FOR THE  
ENVIRONMENTAL PORTFOLIO  
STANDARD.

ARIZONA CORPORATION COMMISSION  
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**RUCO'S APPLICATION FOR REHEARING OF DECISION NO. 63364**

Pursuant to A.R.S. § 40-253, the Residential Utility Consumer Office ("RUCO") requests that the Arizona Corporation Commission ("Commission") rehear the matters decided in Decision No. 63364, docketed February 8, 2001. Decision No. 63364 adopted A.A.C. R14-2-1601 and R14-2-1618 ("Rules"), which effectuated an Environmental Portfolio Standard ("EPS") establishing a mandatory portfolio requirement. RUCO requests that the Commission reconsider adopting the Rules for the various reasons set forth below.

**I. Background**

On April 8, 1999, Commissioner Carl J. Kunasek filed a copy of a new proposed rule entitled Solar and Environmentally-Friendly Portfolio Standard ("EFPS"). Its purpose was to expand and redefine the previous Solar Portfolio Standard (R14-2-1609).

On April 23, 1999, the Commission in Decision No. 61634, amended the Electric Competition Rules to eliminate the Solar Portfolio Standard (R14-2-1609).

1 The Commission's Utilities Division ("Staff") filed a list of recommended questions and  
2 requested interested parties to file comments by May 21, 1999. Pursuant to a procedural  
3 order of June 16, 1999, a full public hearing was commenced on September 16, 1999. The  
4 hearing was adjourned pending the submission of briefs. Briefs were submitted and the  
5 Commission, in Decision No. 62506, approved an EPS which among other things, set  
6 mandatory environmental standards and penalties for non-compliance.

7 The Decision also referred the EPS for rulemaking, which culminated in a  
8 Recommended Opinion and Order of the Administrative Law Judge dated January 17, 2001.  
9 After consideration of the filed written exceptions and the oral comments received at open  
10 meeting, the Commission adopted the Rules in Decision No. 63364. The Rules incorporate a  
11 modified version of the EPS approved in Decision No. 62506.

12  
13 **II. The Commission exceeded its authority in adopting the Environmental Portfolio**  
14 **Standard.**

15 The authority of the Commission to prescribe "just and reasonable rates and charges to  
16 be made and collected by public service corporations within the state..." is derived from Article  
17 15, Section 3 of the Constitution of Arizona<sup>1</sup>. The courts in Arizona have repeatedly held that  
18 the power to make rules, regulations and orders by which a corporation shall be governed  
19 necessarily vests in the Commission by virtue of the Constitutional provisions. See Williams v.  
20 Pipe Trades Industry Program of Arizona, 100 Ariz. 14, 17, 409 P2d 720, 723 (1966).

21  
22  
23 <sup>1</sup> To the extent the Environmental Portfolio Standard requires Affected Utilities and Electric Service Providers to  
24 incur expenses and recoup costs, it can be argued that there is a nexus to ratemaking. However, such a stretch  
is implausible and offends the principles of ratemaking established by statute and case law and put into place for  
the protection of the ratepayer as well as the utility.

1       The Rules require Affected Utilities and Electric Service Providers ("ESPs") to derive a  
2 percentage of the energy they sell from environmentally friendly renewable resources. The  
3 percentage established by the Commission increases yearly over a six-year period and  
4 remains at a fixed percentage for the following six years. The Rules further break down in  
5 percentages the yearly makeup of the types of renewable resources the Utility Distribution  
6 Companies and ESP's are permitted to use to meet their respective portfolio percentages. For  
7 those utilities that are unable to comply with its requirements, the EPS establishes a penalty  
8 that may be imposed by the Commission.

9       By mandating environmental standards, the Commission has determined that the  
10 utilities must invest in a particular type of generation technology. Such decisions should be left  
11 to management's discretion, to be evaluated by the Commission when a company seeks to  
12 include the generation cost in rates. There are no statutory or constitutional provisions that  
13 allow the Commission to substitute its judgement for management on management related  
14 issues. In fact, this separation of powers between management and the Commission is firmly  
15 entrenched in case law.

16               "It must never be forgotten that, while the state may regulate with a  
17 view to enforcing reasonable rates and charges, it is not the owner  
18 of the property of public utility companies, and is not clothed with  
19 the general power of management incident to ownership." State of  
Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service  
Commission of Missouri, 262 U.S. 276, 289, 43 S.Ct. 544, 547, 67  
L.Ed. 981, 31 A.L.R. 807.

20               Southern Pacific Company v. Arizona Corporation Commission, 98 Ariz. 339, 343, 404 P.2d  
21 692, 696 (1965).

22       Should the regulators be allowed to substitute their judgment for management's, the  
23 shareholders as well as the public will lose confidence in management. In adopting the EPS,  
24

1 the Commission substitutes its judgement for management's on managerial decisions. This  
2 clearly falls outside the scope of the Commission's authority.

3  
4 **III. The Environmental Portfolio Standard undermines the principles of a free market.**

5 By establishing a surcharge to pay for the costs of generating energy from  
6 environmentally friendly resources, the Commission is subsidizing the technology utilized to  
7 generate energy. The technology should not be subsidized by ratepayers, but rather by the  
8 business that decides to use environmentally friendly resources as its source of energy. The  
9 constitutionally prescribed duty of the Commission is to determine rates, not jumpstart narrowly  
10 defined private business interests.

11 The EPS provides a guaranteed source of income for businesses engaged in the  
12 conversion of renewable resources to energy. This type of government-sanctioned subsidy  
13 undermines competition in the free market. To the degree the Commission is forward looking  
14 in moving towards the principles of the free market, the EPS takes two steps back.

15  
16 **IV. The establishment of the Solar Electric Fund is not within the Commission's  
17 constitutional and/or statutory authority.**

18 The Rules establish a Solar Electric Fund ("SEF") comprised of the proceeds from the  
19 penalties collected by the ESPs and Affected Utilities who are unable to meet the EPS'  
20 requirements. The proceeds are to be used in the following calendar year by public entities to  
21 purchase solar generators or solar electricity.

22 The Commission's authority to impose penalties on public service corporations who  
23 violate Commission orders derives from Article 15, Section 16 of the Constitution of Arizona.  
24 However, the establishment of funds for penalties collected is a prerogative of the legislature.

1 For example, the legislature enacted A.R.S. § 40-443 which establishes the Pipeline Safety  
2 revolving fund which consists of penalties collected from public service corporations who  
3 violate Article 10 of ARS Section 40.

4 Nowhere does the legislature delegate its authority to the Commission to establish a  
5 fund for the collection and direction of EPS penalties. Except for its broad, constitutionally  
6 vested powers over rates and charges of public service corporations, Ethington v. Wright, 66  
7 Ariz. 382, 189 P.2d 209 (1948), the Commission's regulatory jurisdiction is derived from  
8 legislative authorization. Williams v. Pipe Trades Industry Programs of Arizona, 100 Ariz. 14,  
9 409 P.2d 720 1966; Corporation Commission v. Pacific Greyhound Lines, 54 Ariz. 159, 94  
10 P.2d 443 (1939), Op. Att'y Gen. I 79-099 (April 9, 1979).

11 Absent designation by statute, penalty proceeds are to be paid into the state treasury  
12 and credited to the general fund (ARS §§ 35-141, 35-142). The SEF is not a statutorily-  
13 created fund, and therefore proceeds of any penalty assessed by the Commission cannot be  
14 deposited into it.

15 Likewise, the Rules direct the use of funds without considering the state procurement  
16 laws. ARS § 41-2501 et seq. specifically sets forth the terms and conditions for what a state  
17 agency may contract for or purchase on its own behalf with state funds. ARS § 41-2511 vests  
18 the authority to promulgate such regulations governing procurement issues with the Director of  
19 Administration. Under ARS § 41-2512 the Director has the power to delegate his or her  
20 authority. The EPS sidesteps the procurement statute, and authorizes the Director of the  
21 Utilities Division to select an administrator to select projects to be financed by the Fund.  
22 Neither the legislature, nor the Director of Administration, has delegated the Commission with  
23 state procurement authority.

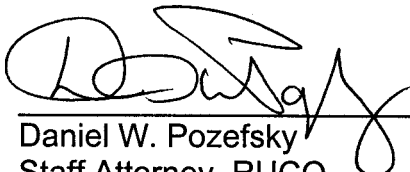
1 The Commission's authority is also limited in the amount of penalty it can impose.  
2 Article 15, Section 16 of the Arizona Constitution and ARS § 40-425(A) limit the penalty to not  
3 less than one hundred nor more than five thousand dollars for each offense. The EPS sets the  
4 penalty at thirty cents per kWh. The Commission is without authority to impose a penalty that  
5 falls outside the constitutional limits.

6 The establishment of penalties, which exceed the amount set by the Constitution and  
7 the establishment of the Solar Electric Fund are nothing more than powers of the legislature to  
8 tax and appropriate revenues, which the legislature derives from the Constitution. (See  
9 AEPCO's Post Hearing Memorandum.)

10  
11 **V. Conclusion**

12 For the foregoing reasons, RUCO requests that the Commission grant rehearing of  
13 Decision No. 63364 and establish an Environmental Portfolio Standard based on the voluntary  
14 implementation of environmental programs.

15 RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of February, 2001.

16  
17   
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